# No. 12,099

IN THE

# United States Court of Appeals
## For the Ninth Circuit

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GEORGE H. GRAHAM,
*Appellant,*

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,
*Appellee.*

## APPELLEE'S PETITION FOR A REHEARING.

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## APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Presiding Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:*

The Atchison, Topeka and Santa Fe Railway Company hereby respectfully petitions for a rehearing of the decision rendered in the above entitled cause on August 30, 1949, upon the following grounds:

(1) That the opinion of the Court assumes or finds facts not warranted by the evidence.

(2) That the reversal of the judgment on a directed verdict in favor of defendant is against law.

## A. MISSTATEMENT OF FACTS.

(1) The opinion (p. 2) states that Dr. Fenlon at Boulder City was "the company doctor".

In fact, Dr. Fenlon was a private physician of the plaintiff's own selection and was first consulted by plaintiff on July 9, 1945 (T.R. 43, 76, 77). This misstatement of fact is material to the issues here involved because plaintiff had first consulted his own private physician, Dr. Fenlon, on July 9, 1945 and continued to consult him, seeing him again on February 13, 1946 (T.R. 43, 76, 77). Plaintiff therefore had the benefit of independent medical advice both prior to the date of the release and thereafter.

(2) The opinion states that plaintiff suffered a crushed intervertebral disc and that this injury is traceable to the accident (Opinion, p. 10). The Court apparently based its decision reversing the judgment of the trial Court to a large degree upon the testimony that plaintiff did not know that he had a ruptured disc and upon the mistaken assumption that there was evidence that this ruptured disc is traceable to the accident. If we examine the transcript on this point there is no evidence which would justify the trial court in permitting a jury to speculate on the question of whether the injury to plaintiff's intervertebral disc was traceable to the accident. Plaintiff's medical expert, Dr. Niemand, first testified that he could not tell when the ruptured disc happened (T.R. 142, 143). Next, plaintiff's witness, Dr. Niemand, testified (T.R. 147) that the injury shown on the x-rays could have existed prior to the time of this

accident. On cross-examination Dr. Niemand testified (T.R. 154) that he could not say when the trauma occurred that caused the disc involvement. In response to a question as to whether he was able to say that plaintiff was hurt at the time he claims in this action before the court, Dr. Niemand replied (T.R. 155) "No, I can't tell you the date of that accident within we will say a reasonable time. I mean, I know it wouldn't go back that far." (This would seem to indicate that Dr. Niemand felt the trauma may have occurred subsequent to the date of the accident.) In response to a question as to whether the trauma which caused the disc condition could have occurred five years before the accident, Dr. Niemand answered (T.R. 157):

> "A. More likely.
>
> Q. More likely five years?
>
> A. Maybe five, I don't know. It is hard to say. It is very difficult to say because it can come—you have to realize this—from such inconsequential trauma that the patient may not be aware of it until x-rays are taken."

Again in attempting to place the date of the trauma which caused the back condition in examining Dr. Niemand with reference to x-rays, the following questions and answers were given (T.R. 159):

> "Q. A few years, so that in February of 1946, the calcification that you read on the film that is now in the box, in your opinion, would be a few years' duration?
>
> A. Uh-huh, as far as I could ascertain."

The accident occurred on July 6, 1945. If the calcification was of a few years' duration it certainly predated the accident. Again (T.R. 160):

> "Q. Doctor, do I understand you when you say that the calcification on the exhibit now in the shadow box in your opinion is of a few years' duration prior to the taking of that x-ray film?
> A. Yes."

The x-ray film was taken February 13, 1946 by plaintiff's own doctor, Dr. Fenlon (T.R. 158, 160). The foregoing is the only testimony of plaintiff's medical expert as to the date of the trauma which caused the crushed disc from which plaintiff complained and certainly would not justify a jury in finding that the crushed disc was suffered in an accident in July, 1945.

The defendant's medical expert, Dr. Soto-Hall, who was called out of turn, testified:

> "There is no question that the degenerative disc pre-existed that date, '45. That is a condition of very long standing; there is no question about it." (T.R. 228, 229).

On the basis of the foregoing evidence we submit that the opinion of this Honorable Court is in error when it finds that there was evidence that the injured disc was traceable to the accident. There could be neither fraud nor mutual mistake with reference to this disc when it is conceded by all medical experts who testified that the disc condition existed prior to the accident.

(3) The opinion (pp. 5, 6) states that at the conclusion of plaintiff's case defendant offered as its only witness Dr. Ralph Soto-Hall.

Dr. Soto-Hall was called as a witness by the defendant prior to the conclusion of the plaintiff's case. He was called out of order with the consent of counsel and as an accommodation to the doctor, who was present in court (T.R. 219, 220). Upon the conclusion of his testimony the plaintiff then resumed his case and further testimony by plaintiff and another witness on his behalf followed (T.R. 240). Plaintiff's motion for a directed verdict was made at the conclusion of plaintiff's case.

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### B. THERE IS NO EVIDENCE OF FRAUD OR MUTUAL MISTAKE AND THE OPINION IS THEREFORE AGAINST LAW.

Plaintiff employed Dr. Fenlon as his own physician on July 9, 1945 (T.R. 43, 77) and he was tended by that doctor from that date up to as late as February 13, 1946 (T.R. 59). In the intervening time plaintiff accepted the hospital and medical services for which he was entitled as a member of the Santa Fe Hospital Association, and when he was discharged from the Santa Fe Hospital and probably still under observation of his own personal physician (T.R. 46, 47), it was with the statement ascribed to Dr. Morrison "Well, he told me to go back to work if I possibly could * * * " (T.R. 47), and after signing the release plaintiff did go back to work, and his services were thereafter terminated, not because of inability to perform his duties.

The settlement: Plaintiff was as well informed of his condition as the defendant. In fact, the matter of his ability to perform services was left entirely in the plaintiff's hands; it was for him to determine whether he felt equal to returning to work. Thereupon he went to the office of the Claims Department of his own volition (T.R. 177), no one invited him there, and he went to see what could be done; there is not one bit of testimony as to what transpired when the release was signed and the check delivered, other than that the sum of $1,000.00 was offered in settlement and Mr. Graham suggested that he had broken two pairs of glasses and he was paid $50.00 more because of the property damage (T.R. 57). This was a disputed claim in all of its aspects. The plaintiff was not laboring under any disability, nor was he threatened or coerced. If there had been any such conduct plaintiff would have been the first to so testify at the trial.

The release is in large print, and over the signature of plaintiff in his own handwriting appears the words, "I have read above release and understand same." (T.R. 180). The printed words of the release contain this statement, "In making this settlement I am not relying upon any statement made by any agent or physician of said railroad company as to what my injuries are, or how serious they are, or when or to what extent I may recover therefrom." (T.R. 179). When we consider these facts with the only possible conclusion from the evidence that the disc condition existed at the time of the accident, this is not a case of fraud, mutual mistake or undue influence.

The attempted rescission: The evidence of plaintiff as to the ability to restore the consideration received, is so evasive and uncertain, except in the one instance when the words were placed into his mouth by his own counsel, that they cannot be accepted as truthful, substantial evidence (T.R. 181-182-183-184-185-186).

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## THE LAW.

Petitioner's brief as appellee fully considers the applicable law but we submit the following additional discussion for the court's consideration.

The trial court had the benefit of viewing the plaintiff on the witness stand and observing his demeanor; had there been a verdict at the conclusion of the defendant's evidence, in favor of the plaintiff, the trial court, if it disbelieved the plaintiff's testimony concerning the release and rescission, could have granted a new trial and because of the uncertainty and insufficiency of plaintiff's alleged claim such a decision would have to be sustained.

The burden of proof on the subject of the release and the rescission was with the plaintiff.

In 22 *Cal. Jur.* 766, Para. 15, it is stated:

> "A written release is presumptive evidence of a good consideration, and the burden of showing a want of consideration is upon the party seeking to invalidate or avoid it. Indeed, the trial judge is not bound to believe an interested witness as against such a presumption if it satisfies his mind.

The burden is upon the releasor to show that the release was procured by fraud."

The Supreme Court of the United States, in the case of *Patton v. Texas & Pacific Railway Co.,* 179 U.S. 658 (21 S.Ct. 275, L.Ed. 361) at page 363 (45 L.Ed.) states:

"That there are times when it is proper for a court to direct a verdict is clear. 'It is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it,' "—citing cases * * *

"Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate

> court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

It has been held also by the Supreme Court of the United States in the case of *Brady v. Southern Railway Company*, 320 U.S. 476 (88 L.Ed. 239), that more than a scintilla of evidence is required in an action against a railroad company under the Federal Employers' Liability Act before the case may be properly left to the discretion of a jury, and that by directing a verdict the result of a trial is saved from the mischance of speculation over legally unfounded claims. At page 243, 88 L.Ed., the court said,

> "But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury," citing cases.

As far as we have been able to search and ascertain, this case regarding "scintilla of evidence" has not been overruled by the Supreme Court of the United States.

Should this decision be permitted to stand, no railroad company can ever feel secure in settling a claim of one of its employees. Such an agreement would always be open to question by a plaintiff and would be permitted to go to a jury after the completion of

the entire case, with the possibility always that an adverse decision to the defendant could be set aside on motion for insufficiency of evidence; and this after a lengthy and expensive trial.

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## CONCLUSION.

Petitioner respectfully prays that a rehearing be granted herein upon the ground that material facts are misstated in the opinion of the court and the opinion rendered is against law, and upon such rehearing respectfully requests that the judgment of the trial court be affirmed.

Dated, San Francisco, California,
September 28, 1949.

Respectfully submitted,

ROBERT W. WALKER,
GUS L. BARATY,
GEORGE A. SMITH,
*Attorneys for Appellee and Petitioner.*

## Certificate of Counsel.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foreging petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
September 28, 1949.

Gus L. Baraty,
*Of Counsel for Appellee and Petitioner.*